DeBolt Transfer, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters' Steel Haulers Local Union No. 800. Case 6-CA-13461(E)

18 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 8 June 1983 Administrative Law Judge Robert W. Leiner issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Applicant filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order.

The Applicant applied to the Board for an award for fees and expenses under the Equal Access to Justice Act[1] (EAJA) after the Board adopted the judge's recommended Order and dismissed the 8(a)(5), (3), and (1) complaint in the unfair labor practice proceeding reported at 259 NLRB 889 (1982).

We agree with the judge, for the reasons he stated, that the Applicant is eligible to receive an award within the meaning of Section 102.143(c)(5) of the Board's Rules and Regulations; and that the General Counsel was not "substantially justified" in issuing and prosecuting the unfair labor practice complaint under Section 102.144. For the following reasons, we agree that the award should include sums the Applicant expended before the EAJA's effective date and sums incurred pursuing this EAJA award.

1. Congress enacted the EAJA in 1980, amending existing statutes to authorize fee and expense awards to prevailing parties in specified adversary adjudications and civil actions against the United States.[2] In so doing, Congress deliberately departed from the "American Rule," which mandates that each litigant ordinarily pays his or her own attorney's fees, *Alyeska Pipeline v. Wilderness Society*, 421 U.S. 240, 247 (1975). "The governing principle of the [EAJA] is that the 'United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation.'" *Matthews v. U.S.*, 713 F.2d 677, 683-684 (11th Cir. 1983), citing *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983).

The EAJA became effective 1 October 1981 and, according to Section 208 of the Act, it applies to "any adversary adjudication . . . which is pending on, or commenced on or after, such date." Section 102.143(a) of the Board's Rules and Regulations provides, "The term 'adversary adjudication' . . . means unfair labor practice proceedings pending before the Board on complaint . . . at any time between October 1, 1981, and September 30, 1984."

The judge's decision in the unfair labor practice case issued 26 May 1981, and was before the Board on the General Counsel's exceptions until the Decision and Order issued 4 January 1982. The case was thus "pending before the Board" on and after 1 October 1981. The General Counsel concedes this point, but nevertheless argues the EAJA does not authorize an award for legal work performed before 1 October 1981. We believe that neither the EAJA nor its legislative history contemplates a bifurcation of pre- and post-effective date work for award purposes.

Unless there is contrary indication in the legislative history, the statute's words govern its interpretation and they should be given their plain, clear, and common meaning.[3] Section 208 of the EAJA, as noted, applies to any adversary adjudication "pending on, or commenced on or after [1 October 1981]." The EAJA's legislative history is silent on the retroactivity issue. In *Berman v. Schweiker*, 713 F.2d 1290, 1296-1297 (7th Cir. 1983), a recent EAJA action arising out of a Social Security Administration adjudication, the court held as follows:

> Applying one of the basic canons of statutory interpretation—the plain meaning of the statute—Section 208 should cover work performed before and after the effective date of the Act as long as the action was pending on October 1, 1981 or was commenced on or after that date. Once a prevailing party, as in the instant case, establishes that the action was pending on October 1, the Act becomes applicable. If Congress had intended to exclude pre-effective date fees, it could have done so by simply stating in Section 208 that only post-effective date fees for pending actions or actions commenced on or after October 1, 1981

[1] EAJA, Pub. L. 96-481, 94 Stat. 2325 (1980); Board's Rules and Regulations, Sec. 102.143, et seq.

[2] The EAJA is codified in two code sections: 5 U.S.C. § 504 (1980 ed., Supp. IV), establishing procedures under which administrative agencies shall award costs and fees to prevailing parties other than the United States in an adversary adjudication, and 28 U.S.C. § 2412 (1980 ed., Supp. IV), waiving the Government's sovereign immunity with respect to fees in civil actions unless expressly prohibited by statutes.

[3] See, e.g., *CPSC v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *Aaron v. SEC*, 446 U.S. 680, 700 (1980).

> were covered by the Act. Congress having failed to exclude pre-effective date fees, it is inappropriate for a court to impose a limitation which Congress chose not to impose. [Footnote and citation omitted.]

We will not, contrary to the General Counsel, read into the statute a qualification—that the EAJA applies to pending cases, but only to the post-effective date portion of the work done—that does not exist and is clearly contrary to the plain meaning of the EAJA. We agree rather with the Third Circuit's conclusion in *Natural Resources Defense Council v. USEPA*, 703 F.2d 700, 712 (1983), an EAJA action brought against the EPA, that "[t]he test is not when the services were rendered, but whether the action was pending on October 1, 1981."[4]

Accordingly, we hold that the award shall include pre-1 October 1981 fees and expenses incurred defending the unfair labor practice case.[5]

2. Section 102.144(a) of the Board's Rules and Regulations, inter alia, limits the eligible applicant's award to fees and expenses incurred "in connection with an adversary adjudiction." The General Counsel asserts that "adversary adjudication" refers only to the unfair labor practice proceeding, and maintains that the judge improperly awarded fees and expenses incurred after the Board's decision in that case issued. We agree with the judge that fees and expenses involved in seeking an EAJA award are expanded "in connection with" the unfair labor practice proceeding. It would be inconsistent with the purpose of a fee-shifting statute such as this to dilute the fee award by refusing compensation for the time reasonably spent securing the right to the award. In an EAJA case involving the Board, the Fourth Circuit specifically held, "The amount of the recovery may include the time spent preparing and prosecuting the motion for attorney's fees." *Tyler Business Services v. NLRB*, above at 77. Accord: *Ocasio v. Schweiker*, 540 F.Supp. 1320, 1323 (S.D.N.Y. 1982); *Photo Data v. Sawyer*, 533 F.Supp. 348, 353 (D.D.C. 1982).[6]

We therefore hold that the award shall include fees and expenses for time spent pursuing recovery of attorney's fees under the EAJA.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Applicant, DeBolt Transfer, Inc., Homestead and Ambridge, Pennsylvania, shall be awarded $6008.18 pursuant to its EAJA application, as amended.

[4] Every court of appeals that has ruled on this issue agrees that the EAJA permits a retroactive fee award so long as the matter was pending on 1 October 1981. See, in addition to the Seventh Circuit's *Berman* case and the Third Circuit's *Natural Resources* case, *Matthews v. U.S.*, 713 F.2d 677, 682 (11th Cir. 1983); *Kay Mfg. Co. v. U.S.*, 699 F.2d 1376, 1378–79 (Fed. Cir. 1983); *Tyler Business Services v. NLRB*, 695 F.2d 73, 77 (4th Cir. 1982), rehearing en banc denied Feb. 7, 1983.

We note that the Supreme Court has similarly interpreted other fee-shifting statutes as applying to work performed before the effective date of the law where the case was pending on that date. *Hutto v. Finney*, 437 U.S. 678 fn. 23 (1978) (42 U.S.C. § 1988); *Bradley v. School Bd. of the City of Richmond*, 416 U.S. 696, 711–721 (1974) (20 U.S.C. § 1617).

[5] See Robertson and Fowler, *Recovering Attorneys' Fees From the Government under the Justice Act*, 56 Tulane L. Rev. 903, 943–944 (1982), in which the authors contend that retroactive application is consistent with the purposes of the EAJA.

[6] The General Counsel himself notes that the Justice Department has chosen not to contest the recoverability of sums incurred pursuing the EAJA claim, and concedes that the Administrative Conference of the United States, in drafting the model EAJA rules, contemplated that an applicant's counsel would be reimbursed for time spent in successfully prosecuting an EAJA application. (46 Fed. Reg. 15895, 15899 (Mar. 10, 1981)).

SUPPLEMENTAL DECISION AND ORDER

(Equal Access to Justice Act)

ROBERT W. LEINER, Administrative Law Judge. This Supplemental Decision and Order is issued pursuant to Sub-part T, Section 102.153 of the Board's Rules and Regulations, 29 C.F.R. Chapter I, Part 102.

On January 4, 1982, the Board issued its Decision and Order in the underlying proceeding (259 NLRB 889) dismissing the 8(a)(1), (3), and (5) complaint in its entirety. On January 28, 1982, DeBolt Transfer, Inc., herein sometimes called Applicant, filed an application for attorney fees and expenses under the Equal Access to Justice Act.[1]

On February 24, 1982, the General Counsel moved to dismiss the application on various grounds, which motion was denied in part and granted in part by my order of March 19, 1982, which, in turn, authorized the General Counsel to file an answer to the DeBolt application.[2] By virtue of the order granting in part the General Counsel's motion to dismiss, DeBolt on March 25 1982, filed a supplement to its application wherein it specified the *dates* on which certain expenses of $90.88 were incurred. The supplemental application showed that all such $90.88 expenses were incurred after the July 17, 1980 issuance of complaint except for a 70-cent phone call which was incurred on June 5, 1980.

On April 22, 1982, the General Counsel submitted its answer to the application which answer admitted in part and denied in part the allegations of the application. On May 10, 1982, DeBolt filed its reply to the General Counsel's answer wherein, inter alia, it moved that the General Counsel's answer should be dismissed as untime-

[1] 5 U.S.C. 504, Pub. L. 96-481, 94 Stat. 2325; Regulations of the National Labor Relations Board, Sec. 102.143, et seq.; 29 C.F.R. 102.

[2] Meanwhile, DeBolt, on March 12, 1982, had filed a verified answer to the General Counsel's motion to dismiss. My order of March 19, 1982, followed.

ly filed under Board Rules and Regulations, Section 102.150(a).

On May 24, 1982, the General Counsel filed a motion for leave to file a response to applicant's reply to the General Counsel's answer (which motion I grant), relating principally to Respondent's motion to dismiss the General Counsel's answer as untimely filed. The General Counsel also moved that Respondent's reply, in turn, be dismissed as untimely filed.

Disposition of Motions

In support of DeBolt's motion to dismiss the General Counsel's answer as untimely filed, it notes that my order granting in part and denying in part the General Counsel's motion to dismiss was dated March 19, 1982, and that the General Counsel's answer which was to be filed pursuant to that order was dated April 22, 1982. DeBolt points to Section 102.150(a) which provides, inter alia, that the "filing (by the General Counsel) of a motion to dismiss the application shall stay the time for filing an answer to a date 30 days after issuance of any Order denying the motion." Thus, DeBolt urges that the General Counsel's answer is dated beyond the 30-day period for filing the answer.

In its turn, the General Counsel urges, in its motion for leave to file a response to the applicant's reply to the General Counsel's answer, (a) that its April 22 answer was timely filed because under the Board's Rules and Regulations concerning the computation of time for filing papers (Sec. 102.114(a)), the day of the issuance of my Order (March 19, 1982) is not to be counted and that 3 days in addition are to be allowed for mailing. In short, since the General Counsel's answer was indeed filed with me at 4:39 p.m. on April 22, the answer was filed on the 30th day. The General Counsel further argues (b) that, in any case, since the applicant, pursuant to my order, did not file its supplement to its application until March 26, 1982, regardless of Respondent's characterization of the matters therein as "minor" and since the matters in the supplement were required to be addressed in the General Counsel's answer, the General Counsel's answer was in any event filed on April 22, 1982, within the Section 102.150(a) 30-day period in view of the date of applicant's *compliance* with the order (March 26, 1982) rather than the date (March 19, 1982) of the Order. For the above reasons submitted by the General Counsel, I deny Respondent's application to dismiss the General Counsel's answer as untimely filed.

Further, the General Counsel, in its response to the Applicant's reply to the General Counsel's answer, asserts that Applicant's *reply* to the General Counsel's answer was itself untimely filed. The General Counsel argues that pursuant to Section 102.150(d) of the Board's Rules and Regulations, a reply may be filed within 15 days after the service of an answer. The General Counsel's answer was served on Respondent by mail on April 22, 1982. Accordingly, the General Counsel asserts that, not counting April 22, and adding 3 days to the prescribed period as required under Section 102.114(a), the Applicant's reply should have been filed not later than Monday, May 10, 1982. The reply, according to the General Counsel, was not filed until it was *received* by me. In this regard, notes the General Counsel, Section 102.114(b) of the Board's Rules provides that the document "must be received by the Board . . . before the close of business of the last day of the time limit . . . ." Since the Applicant's reply to the answer was first mailed on May 10, and was not received by me until May 11, the General Counsel argues that it was untimely filed and should be stricken and disregarded. I agree. Respondent has offered no explanation for its failure to abide by the plain time limitations in Sections 102.150(d) and 102.114(a) and there has been no showing of an honest attempt to substantially comply or why compliance was not possible. *Alfred Nickles Bakery*, 209 NLRB 1058, 1059 (1974); *Auto Chevrolet*, 249 NLRB 529 (1980).

Notwithstanding that Applicant's reply to the General Counsel's answer was untimely filed, and I have stricken it on the General Counsel's motion, in fact, it cannot be substantially disregarded because the same matters contained in Applicant's reply have been urged continually by Applicant and argued by the General Counsel throughout these supplemental proceedings. Therefore, though I strike the Applicant's reply as untimely, the arguments contained therein have been repeatedly asserted and are nevertheless before me and taken account of.

The Merits of the Disputed Application

The General Counsel admits certain of the allegations of DeBolt's application including (1) that Applicant is the Respondent who prevailed in the unfair labor practice proceedings before the Board; (2) that the Board, in its Decision and Order of January 4, 1982, dismissed the General Counsel's 8(a)(1), (3), and (5) complaint in its entirety; and (3) that the case was pending before the Board after October 1, 1981, the effective date of the Equal Access to Justice Act.

Eligibility: The General Counsel initially asserted that Respondent's application was deficient concerning proof of its lack of affiliation with other entities so as to make the Applicant ineligibile pursuant to requirements concerning the net worth (not in excess of $5 million) and aggregate number of employees (fewer than 500) specified in Sections 102.143(c)(5)[3] and 102.143(g)[4] of the Board's Rules and Regulations. Applicant's *affiliated* net worth appears to be less than $3.5 million; and the General Counsel does not argue that Respondent employs as many as 500 employees. The General Counsel, in its

[3] Sec. 102.143(c): Applicants eligible to receive an award are as follows:

(5) any other partnership, corporation, association, or public private organization with a net worth of not more than $5 million and not more than 500 employees.

[4] Sec. 102.143(g): The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interests, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliate entities. In addition, financial relationships of the Applicant other than those described in this paragraph may constitute special circumstances that will make an award unjust.

latest response (to Applicant's proofs on affiliation and net worth) of April 21, 1983, concedes that "there is no longer an issue with respect to Applicant's eligibility." I agree and therefore conclude that, pursuant to Section 102.143(g), Applicant has shown an aggregate net worth of less than $5 million and an aggregate number of employees less than 500. I find that no financial relationship of the Applicant constitutes special circumstances to make an award unjust. I therefore conclude, in sum, that Applicant is "eligible" within the meaning of Section 102.143(c)(5) of the Rules and Regulations.

Substantially Justified "or" "Reasonable in law or fact": Sec. 102.144(a) of the Rules and Regulations provides:

> (a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that its position in the proceeding was reasonable in law and fact.

In a memorandum supporting its answer, the General Counsel urges that its position in issuing complaint was "substantially justified" within the meaning of Section 504(a) of the Equal Access to Justice Act (EAJA).[5] The General Counsel urges, and I agree, that in the measurement of the breadth of "substantially justified," the legislative history indicates that no adverse presumption should be raised based on the fact that the Government did not prevail or that the Government was in good faith advancing a novel, but credible, extension or interpretation of the law. See *Tyler Business Services v. NLRB*, supra. Thus litigation of novel or close questions of fact or law by the General Counsel is not to be effectively barred by EAJA by burdening the General Counsel with expenses and fees thereby inhibiting the Government in vigorous enforcement of the National Labor Relations Act. In addition, the General Counsel urges that (1) there was at least some issue relating to credibility and that (2) the General Counsel should not be liable for these attorney fees and expenses where, as here, there was a genuine issue of contract interpretation. I conclude to the contrary: There was no credibility issue; and there was no genuine issue of contract interpretation.

The General Counsel argues in this latter regard that, while the contract provisions permitted the cancellation of *individual* equipment leases (G.C. answer, p. 4), the General Counsel was *reasonable* in issuing a complaint on the theory that the contract did not address or permit the unilateral multiple cancellation of trailer leases. The General Counsel argues that since lease *rates* under owner-operator usage are at least arguably a mandatory subject of bargaining (*Teamsters v. Oliver*, 358 U.S. 283 (1958)), then mass cancellation of leases (without changes in rates) is also a mandatory subject of bargaining notwithstanding that the contract gives express treatment to the individual cancellation of leases. The General Counsel further argues that the contract (art. 55, sec. 18) prohibits schemes to "defeat the terms of the Agreement wherein the provisions as to compensation for services on and for use of equipment owned by owner-operator shall be lessened"; and that DeBolt's unilateral cancellation can arguably be viewed as such a scheme.

The collective-bargaining agreement (art. 61, sec. 7) provides a contractual mechanism whereby an employer may request economic relief for rates of compensation. The General Counsel states that the evidence shows that the Union informed DeBolt that all requested economic relief, including the aforesaid cancellation of trailer leases, would have to be submitted to Eastern Conference Joint Conference Review Committee under the collective-bargaining agreement. Thus, the General Counsel urges that, in the Union's view, the contract did not allow for wholesale lease cancellation absent a special waiver (G.C. answer, p. 5). In support of this alleged factual interpretation by the Union, the General Counsel also notes that DeBolt himself queried the Union's chief officer as to whether the Union was "sure" that DeBolt had the right to cancel the trailer leases. The General Counsel argues that even the employer did not believe that there was a clear right to cancel the leases on a wholesale basis. If the applicant himself was unsure, then the General Counsel urges that the General Counsel was substantially justified in prosecuting the case, based on the reasonable interpretation of the contract advanced by the doubts of the Applicant, itself, and supported by evidence indicating that it was the parties' understanding that across-the-board lease cancellation was prohibited at least by implication.

Discussion and Conclusions

The particular issue to which attention must be directed is only whether the General Counsel was "reasonable" in believing that DeBolt had no right of mass cancellation of the *leases*. For instance, the General Counsel's present introduction or reintroduction of the irrelevant question concerning DeBolt's obligation to seek *economic* relief (i.e., on rates of compensation) under the terms of the contract was dealt with in the case in chief and will not be addressed here. It was not in issue there nor is it here. Suffice it to say that the Applicant herein was not seeking to restructure or gain relief from wage rates; it was interested only in the unilateral cancellation of the trailer leases.

Insofar as the General Counsel urges that it was substantially justified in believing that the parties themselves believed that mass cancellation of the leases was not an employer contract right as the General Counsel purports to show by alluding to matters completely de hors the

[5] The General Counsel points to the legislative history (S. Rep. No. 96-253, at 6; H.R. Rep. No. 96-9418 at 10 to show that the test of "substantially justified" is "reasonableness." That "reasonableness" standard, of course, has been incorporated directly into Sec. 102.144(a) above. In *Tyler Business Services v. NLRB*, 695 F.2d 73 (4th Cir. 1982), the court, quoting from legislative history, asserts that the Government "should have to make a strong showing to demonstrate that its action was reasonable." The Board notes that "reasonableness" is not to be equated with "a substantial probability of prevailing." *Jim's Big M*, 266 NLRB 665 fn.1 (1983).

underlying record,[6] the General Counsel is on weak ground. For as the General Counsel notes, by letter as early as January 29, 1980 (R. Exh. 1), the Union advised DeBolt as follows:

> Please be advised that equipment leases may be cancelled in accordance with the collective-bargaining agreement.

This letter was written *after* a collective-bargaining meeting relating particularly to the existence of DeBolt's unilateral right of group cancellation. If DeBolt also orally queried Flynn (union chief negotiator) of DeBolt's right to do so, it is not unreasonable for a small employer to seek to reaffirm that right from the Union with which it is bargaining separately.

In view of what I regard to be the Union's above statement on lease cancellation to DeBolt as early as January 29, 1980, in view of the collective-bargaining agreement, as the Board found, giving DeBolt the right, as the General Counsel concedes, to cancel an individual lease, and in view of the practice of the drivers to unilaterally cancel *their* leases with DeBolt without bargaining through the Union when they believed cancellation was economically justified (and without the drivers attempting to bargain even on an individual basis but merely giving notice, pursuant to the contract, of cancellation), I cannot see how issuance of complaint based on mass or simultaneous cancellations in this regard was "reasonable." The face of the contract and the practice of the parties is all the other way.

A further problem in this case, as it may well be in other cases, is whether issuance of complaint may be defended on the ground that though "novel," the General Counsel's theory was "reasonable" as an extension of existing law. I believe it was not reasonable. If every complaint (not relating to factual issues) may be justified on the ground that it was "novel" or that to award fees and expenses would squelch vigorous enforcement by unduly burdening the General Counsel's willingness to explore novel or close questions of law, then there will be little ground for a successful respondent (applicant) to urge the award of fees and expenses if the General Counsel can merely articulate a logically acceptable syllogism to indicate a mere extension of existing principles. Congress has rejected the position that awards be made to a prevailing party only where the Government's action was arbitrary, frivolous, unreasonable or was continued and maintained after it clearly became so. *Robertson & Fowler, Recovering Attorneys' Fees . . . Under the Equal Access to Justice Act*, 52 Tulane Law Review 903, 929; cf. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); H.R. Rep. No. 1418.

There is sometimes a narrow line between, on the one hand, the General Counsel's reasonable exploration of novel and close issues ending with the statutory conclusion that the litigation was "substantially justified" and, on the other hand, the object of the Equal Access to Justice Act of awarding to applicants fees and expenses in connection with adversary adjudication in which it has wholly prevailed. Here, I believe, the General Counsel is on the wrong side of the line. Bearing in mind that the General Counsel has the burden to prove, based on the entire case,[7] the reasonableness of its action, it seems to me that (1) a reading of the contract which gives the Respondent the right of individual cancellation, (2) together with direct *evidence* supplied by the Union (R. Exh. 1) that "equipment leases may be cancelled in accordance with the collective-bargaining agreement," (3) the absence of evidence of any subterfuge or antiunion motivation in the mass cancellations but only a clear economic need to do so, (4) in view of the conclusion that the wage rates in the leases were a matter totally irrelevant in the right to cancel, (5) that there is no contract mechanism which required Respondent to seek union permission for lease canceling (as was the case in changes in wage rates), and (6) in view of the practice of the drivers who canceled leases without bargaining through the Union or even bargaining directly with DeBolt, I conclude that the General Counsel was not substantially justified in issuing complaint, much less in pursuing the matter thereafter. I conclude that the General Counsel failed to sustain its burden of showing, under Section 102.144(a), that the "proceeding was reasonable in law and fact," and that the General Counsel was betting on a long shot. Cf. *Jim's Big M*, 266 NLRB 665 (1983).

Fees and Expenses Incurred Prior to the Effective Date of EAJA, October 1, 1981

The General Counsel urges that all fees and expenses incurred prior to October 1, 1981, the effective date of EAJA, are not to be recoverable. Complaint in the underlying unfair labor practice case was issued on July 17, 1980. My decision is dated May 26, 1981. The Board's Decision and Order is dated January 4, 1982.

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[6] The Union allegedly gave signed affidavits indicating that the parties interpreted the contract as prohibiting across-the-board cancellation of trailer leases while Respondent, though cooperating in the investigation, refused to permit its witnesses to give sworn, signed affidavits.

[7] Again, there is little doubt as to the existence of a statutory prima facie case, where, as here, it is not merely the unilateral cancellation of a single lease, compare *Brown & Connolly, Inc.*, 237 NLRB 271, 280 (1978), with *Mike O'Connor Chevrolet*, 209 NLRB 701, 703-704 (1974), but of all the leases, and thus a mandatory subject of bargaining. Cf. *Teamsters v. Oliver*, 358 U.S. 283 (1958); *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349-350 (1958). Rather, it is the problem of the existence of a *defense* by contract and practice. The General Counsel cannot prove its justification in issuing complaint merely by relying on its prima facie case, no matter how dazzling. It has, I believe, a right and also duty to examine the practice of the parties and the language of collective-bargaining agreement, *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), for patent defenses. This, I believe, it failed to do. To argue that the contract waived only individual lease cancellation because it refers to the Applicant's right to cancel a "lease" (i.e., singular) under the contract mechanism rather than "leases" (i.e., plural) is disingenuous since the General Counsel's argument falls if Applicant cancels consecutively, a judicial instant apart. Moreover, the Union directly stated that "equipment *leases* may be cancelled in accordance with the collective bargaining agreement." (R. Exh. 1.) (Emphasis added.) Lastly, to rely on an inference from dictum in *Brown & Connolly, Inc.*, supra further demonstrates that the General Counsel, at best, was concentrating only on constructing a prima facie case since in that case the unilateral change in sick leave policy, allegedly a violation of Sec. 8(a)(5), was not met by any contract defense. Indeed, the single breach of contract there was discriminatorily motivated. *Brown & Connolly*, supra at 280. While "substantial justification" is not dependent on the General Counsel's proof of a prima facie case, *Enerhaul, Inc.*, 263 NLRB 890 (1982), the existence of a prima facie case does not, ipso facto, demonstrate "substantial justification."

Whatever the value of the General Counsel's argument by analogy growing out of *Brookfield Construction Co. v. United States*, 661 F.2d 159 (Court of Claims, 1981) with regard to interest on contract claims for periods prior to the effective date of the Contract Disputes Act, in *Heydt v. Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982), the court stated that EAJA applies to all fees and expenses incurred in cases pending on October 1, 1981, whether or not the expenses were incurred before that date. See also *Photo Data, Inc. v. Sawyer*, 533 F.Supp. 348; *Underwood v. Pierce*, 547 F.Supp. 256; *Kennedy v. United States*, 542 F.Supp. 1046. By Section 102.143(a), as the Applicant notes, an applicant otherwise eligible, is eligible if there is an "adversary adjudication," defined therein as including an unfair labor practice proceeding "pending before the Board on complaint . . . at any time between October 1, 1981, and September 30, 1984." Since the complaint, on the General Counsel's exceptions following the May 26, 1981 decision, "was pending before the Board" between October 1, 1981, and September 30, 1984, the applicant is eligible for the award. The courts having consistently construed the award to include the fees and expenses incurred before October 1, 1981, for prior pending adversary adjudications, I reject the General Counsel's argument to the contrary. Such pre-October 1, 1981 fees and expenses are includible.

Fees and Expenses Incurred Prior to the Date of Issuance of Complaint, July 17, 1980: The General Counsel also urges that fees and expenses incurred prior to the date of issuance of complaint are not recoverable under the Act.

The General Counsel has no power to file charges thereby initiating a Board investigation.[8] That is the sole function and right of the Charging Party. Yet complaints often issue under the statute at the designation of the General Counsel on matters which are not necessarily entirely foreseeable within the subject matter of the charge. Indeed, the complaint and the charge must be related only to the extent as to negate the possibility that the Board is proceeding on its own initiative. *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970). Thus, it seems to me that it would be unduly burdensome to hold the General Counsel responsible for fees and expenses prior to issuance of complaint when the General Counsel has no authority or responsibility for the filing of the charge and therefore for the incurring of expenses between the time of filing of the charge and issuance of complaint.

On this point, I part company with those who would permit recovery because EAJA Section 504(a)(1), Section 102.144(g) of the Rules and Regulations, permits recoupment of fees and expenses "in connection with" the adversary proceeding. While precomplaint legal services are often important, indeed vital (since a forceful presentation by respondent's counsel can sometimes persuade a Board Regional Director to not issue complaint), yet logic and circumstances militate in favor of excluding precomplaint recovery. Indeed, when a person against whom a charge is filed retains counsel who charges a fee and raises expenses, such funds are ordinarily expended whether or not complaint issues. If these funds are expended whether or not the General Counsel issues complaint, it cannot be said that such expenditure was in "connection with" the adversary proceeding. Indeed, where counsel is most successful and, by persuasion, totally avoids issuance of complaint, his services are most prized. Yet, under EAJA, there is little room to argue that fees and expenses under such circumstances would be recoverable. Again, therefore, such precomplaint fees and expenses must be borne by the parties since they are incurred regardless of the initiation of the adversary proceeding, i.e., regardless of the issuance of complaint.

Further to argue that, in any event, such precomplaint fees and expenses are recoverable where complaint *does* issue, is to entangle the Board in the morass of assessing the fees and expenses attributable to those elements (if any) ultimately appearing in the complaint compared to the matters appearing in the charge. Better such fees and expenses are borne by the parties and not held to be incurred "in connection with" the adversary adjudication for, as above noted, since the General Counsel is powerless to control the filing of charges, they are incurred with regard to the charges rather than the complaint.

In agreeing with the General Counsel, I will therefore recommend to the Board that it reject the Applicant's application insofar as the Applicant seeks to recover for fees and expenses incurred prior to issuance of complaint.

Fees and Expenses Incurred in the EAJA Proceeding

The General Counsel contends that fees and expenses sought in Respondent's application for the time spent in drafting the EAJA application and other further papers relating thereto are not recoverable. Thus all fees incurred after the issuance of the Board's decision, according to the General Counsel, should not be the subject of a proper application.

The General Counsel points to Section 102.144(a) which states that the eligible applicant may receive an award for fees and expenses "incurred in connection with an adversary adjudication." The General Counsel then narrowly defines "adversary adjudication" to mean the unfair labor practice proceeding only. That, I believe, is not correct. As opposed to the case, supra, of precomplaint fees and expenses which are incurred *regardless* of issuance of complaint, further fees and expenses after issuance of complaint are incurred "in connection with" the adversary proceeding. Certainly, as a matter of grammatical construction, the fees incurred in the attempt to collect the award concerning the underlying Board adjudication is an attempt "in connection with" the underlying adversary adjudication. Moreover, the General Counsel must bear the responsibility for Respondent's further incurring of fees because the General Counsel has it within his power to limit such further fees and expenses. Thus, the General Counsel cannot reasonably be heard to oppose the award of further fees and expenses by virtue of the General Counsel's own actions.

[8] The General Counsel, when issuing complaint, is forbidden to so stray from the scope of the underlying charge as to give the appearance that he is acting on his own. Compare *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970), with *Exber, Inc. v. NLRB*, 390 F.2d 127 (9th Cir. 1968).

In the alternative, the General Counsel argues that even if "in connection with" includes the expenses incurred in the EAJA proceeding, the General Counsel's position in the EAJA proceeding being "clearly reasonable," Applicant's subsequent EAJA expenses should be rejected. The General Counsel having failed herein to prove the substantial justification of its issuance of complaint by showing its position in the proceeding to be reasonable in law and fact under Section 102.144(a), its alternative argument becomes academic. I need not rule on such an issue. I therefore reject the General Counsel's arguments that further fees and expenses undertaken to secure Applicant's right under EAJA should be excluded. They are to be included. *Tyler Business Services v. NLRB*, 695 F.2d 73 (4th Cir. 1982).

Fees and Expenses Recoverable: Respondent submitted a schedule of fees and expenses, incurred in defending the underlying unfair labor practice case, consisting of attorney's fees of $5542.50 based on a total of 73.9 hours at $75 per hour (Respondent's application, Exh. C) and expenses of $90.88. The total application therefore is $5633.38. It appears, however, as Applicant asserts, that it devoted time and incurred expenses in the pursuit of the award under EAJA in a further sum $1080 (therefore making its attorney's fees $6622.50) and additional expenses of $6.30 (making the expenses $97.18) for a grand total of $6719.68. This sum was itemized in its supplement to its application filed on or about March 26, 1982, pursuant to my order of March 19, 1982. To be deducted from the figure, as noted supra, are 9.5 hours at $75 per hour, the time (Application, appendix C) spent prior to issuance of complaint or $712.50. I approve the payment of this net sum, $6008.18.

At all material times subsequent to Applicant's filing its original application, the General Counsel opposed the application on the ground, inter alia, of Applicant's lack of eligibility. At several stages in the proceeding, I granted the General Counsel's successive motions requiring and directing Applicant to supply further evidence of its eligibility and particularly regarding *affiliation* of other entities and the effects of aggregating *their* net worth and number of employees with Applicant's, pursuant to the terms of Section 102.143(g), supra, of the Rules and Regulations. Thus, I regarded as meritorious the General Counsel's request for further information, all of which Applicant supplied. The result, however, as above noted, was the General Counsel's concession that Applicant was an "eligible" petitioner.

Applicant, on May 12, 1983, submitted a "Second Supplement to Application for Award of Fees and Expenses" requesting a total of $1809.15 ($1725 additional in fees; $84.15 in additional expenses) substantially for the time spent and expenses incurred in meeting the General Counsel's proper requests for proof of eligibility based on lack of *affiliation*.[9]

The General Counsel's response, dated May 26, 1983, opposes this supplementary application, inter alia, on the ground that these additional fees and expenses flow from inaccuracies and errors in information which Applicant was required to supply with its application, and to reimburse Applicant therefor would be inequitable.

I agree. While the burden of proof to avoid an award "to an eligible applicant" is on the General Counsel (by showing the General Counsel's position to have been "reasonable" in law and fact)[10] the burden of proof as to "eligibility" under Section 102.147(f)[11] clearly is on Applicant for such "full disclosure . . . sufficient to determine whether the applicant qualifies" that it originally failed to do so but incurred fees and expenses in its successful effort to prove eligiblity was its own doing. The General Counsel should not shoulder a financial burden placed by the Rules on Applicant. Thus, I recommend that the Board deny the additional fees and expenses Applicant incurred to demonstrate its eligibility, notwithstanding it ultimately proved such eligibility, because of Applicant's repeated intermediate failure to submit proof thereof.

It is therefore my recommended[12]

ORDER

That Applicant be awarded $6008.18 pursuant to its EAJA application, as amended.

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[9] Since the aggregated net worth and number of employees were ultimately found not disqualifying under the Rules, it was not necessary to pass on the legal question of affiliation. Yet, in spite of Applicant's original denial of any affiliation, there is little question that the evidence, revealed by Applicant, showed that the General Counsel's successive requests for proof of lack of affiliation were reasonable.

[10] Sec. 102.144(a).

[11] "Each applicant . . . must provide with its application a *detailed exhibit* showing the net worth of the applicant and any affiliates. . . . The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part." (Emphasis added.) But cf. *Hensley v. Eckerhart*, 31 FEP Cases 1169, citing *Davis v. County of Los Angeles*, DC, Calif. 1974, 8 FEP Cases 244, permitting a fee award covering "all time reasonably expended in pursuit of the ultimate result."

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.